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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 833

UNITED STATES OF AMERICA
ex rel. EUGENE HAIRSTON,

Petitioner,

vs.

FRANK J. PATE, Warden, Illinois State Penitentiary; and HERBERT D. BROWN, Director of Public Safety,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on August 12, 1969, dismissing petitioner's appeal from an order dismissing a petition for a writ of habeas corpus.

OPINION BELOW.

The memorandum of judgment order of the United States Court of Appeals is unreported. The memorandum of judgment order of the District Court for the Northern District of Illinois, dismissing the petition for writ of habeas corpus, was entered on April 25, 1969, and is unreported. A certificate of probable cause was refused and the appeal dismissed on August 12, 1969. The orders of the Court of Appeals are set out in full in Appendix A to this petition.

THE RECORD.

A certified copy of the record below has been timely filed with this Court.

JURISDICTION.

This petition is presented for review of the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED.

Illinois law provides for bail on appeal in criminal cases. The question presented here is whether Illinois may, consistent with the bail provisions of the Eighth Amendment, and the Due Process and Equal Protection clauses of the Fourteenth Amendment, administer that provision so as to grant bail on appeal to some while denying such relief to others, without standards, hearing, reasons, or distinctions between cases in which bail on appeal is granted or denied.

1. Once a state grants a right to bail on appeal, are there standards that must be met in granting or denying requests for such bail, subject to federal standards upon federal habeas corpus, under the Eighth and Fourteenth Amendments so as to avoid making bail on appeal a matter of grace?

2. Is it a violation of the petitioner's constitutional rights to due process to deny him bail on appeal where the record shows that he was allowed bail from conviction to sentence, but where bail on appeal was denied upon sentence, where there was no change in circumstances?

3. Is it a violation of the petitioner's constitutional rights to equal protection to deny him bail on appeal where the trial and reviewing courts continue to grant bail on appeal to persons with serious records of criminal convictions on appeals of charges greater than the charge from which petitioner appeals?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Ill. Rev. Stat. 1967, Ch. 38, Sec. 107(d).

Ill. Rev. Stat. 1967, Ch. 110A, Sec. 609(d).

United States Constitution, Eighth Amendment.

United States Constitution, Fourteenth Amendment.

STATEMENT OF THE CASE.

On September 12, 1967, one Dennis Jackson shot three men and one later died. The State, on an accountability theory, charged petitioner for Jackson's actions, and alternatively, charged petitioner with soliciting Jackson to commit these crimes.

Petitioner was convicted of the three counts of solicitation charges and acquitted of the other substantive charges in a jury trial. When the jury returned its verdict the trial court admitted petitioner to bail ($15,000). After a hearing in mitigation or aggravation of punishment where character evidence in petitioner's favor by a neighborhood businessman and by a Catholic priest was uncontroverted, the trial court entered a sentence of 5 to 15 years, where the maximum penalty was 20 years. Without any change in circumstances, and without a hearing, the trial court denied bail on appeal.

Petitioner had no prior felony convictions, and three minor misdemeanor convictions, where he received minimal penalties. While on bail he had appeared in court whenever his case was called and during this period there was no effort by the prosecution to revoke bail. Plaintiff has appealed. His abstract and brief on the merits will be filed as exhibits to this petition, and the hearing in mitigation appears in the abstract of petitioner's trial record, pp. 179 to 212. The entire record on petitioner's bail request reads:

> Mr. Cotsirilos (Defense Counsel): Your Honor, I will advise the court now that we will file a notice of appeal within the statutory time.

The Court: Okay, you may do so.

Mr. Schreier: Your Honor, there is no appeal bond, as I understand it, now?

The Court: The Court is going to deny an appeal bond.

Mr. Cotsirilos: Your Honor, this man has been out for sixty days. You heard what these people said.

The Court: I know that.

Mr. Cotsirilos: We ask that you set an appeal bond. Even if you were to increase it, it would be perfectly agreeable.

The Court: Mr. Cotsirilos, this court is going to deny an appeal bond. You can file your notice and you can go to the Appellate Court and request an appeal bond from them.

Mr. Cotsirilos: Judge, we can't get into the Appellate Court immediately. And there is no reason to take this man into custody. He has appeared every time he was supposed to appear before your Honor.

The Court: Gentlemen, this is the order of the court. The court stands adjourned.

There were no findings or reasons stated.(*)

(*) There is a dispute between the circuits as to whether or not reasons must be specified to support or deny bail. The record was deemed inadequate in *United States* v. *Harrison*, 405 F. 2d 355 (D.C. Cir. Oct. 23, 1968); *United States* v. *Jackson*, (C.A.D.C. May 16, 1969, 3 Cr.L. 2185, May 28, 1969). The record was considered adequate in *United States* v. *Porter* (U.S.D.C. March 24, 1969, 5 Cr.L. 2062, April 23, 1969); *United States* v. *Blyther*, 295 F. Supp. 1088 (D.D.C. Jan. 6, 1969). In the present case the record is clear: no basis for denying bail was presented by the prosecution and there is no basis to refuse petitioner bail.

Petitioner has appealed his conviction to the Illinois Supreme Court. The state never contended that the issues raised on appeal were insubstantial or that the appeal was frivolous.

As appears in the brief, petitioner shows, *inter alia,* that he is entitled to discharge, as he was denied the constitutional right to a speedy trial, that the acquittals where he was tried on an accountability theory on the substantive charges were acquittals of the inchoate charge of solicitation of the substantive offenses, either as a plea in bar or under the constitutional prohibition against double jeopardy, and that the state failed to meet its proof beyond a reasonable doubt. Petitioner shows, alternatively, that he is entitled to a new trial because he was photographed under floodlights by television cameras in front of the jury, because of prejudicial newspaper publicity, conduct of the prosecution and rulings of the court, and closing argument. The appeal was filed on direct appeal to the Illinois Supreme Court as constitutional questions of substance are at issue, Illinois Supreme Court Rule 603, Ill. Rev. Stat. 1967, Ch. 110A, Sec. 603.

Petitioner exhausted state remedies.(*)

A writ of habeas corpus was denied by the District Court for the Northern District of Illinois, Eastern Division, on April 25, 1969 (Memorandum Order set out in

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(*) He sought bond on appeal from the Illinois Supreme Court, on three separate occasions, September 3, 1968, October 1, 1968, by a single judge, and on October 3, 1968, by the full Illinois Supreme Court, all without opinion. This Court denied a motion for emergency relief on November 18, 1968, by one Justice, and on December 9, 1968 by the Court.

Appendix "A") and a "motion for emergency relief" was denied by the Court of Appeals for the Seventh Circuit on May 5, 1969, rehearing denied on July 22, 1969, and a certificate of probable cause was denied on August 12, 1969 (Memorandum Order set out in Appendix "A").

The brief and abstract of petitioner's appeal on the merits was not available when these rulings were made. The basis in these proceedings for the state's objection to bail is solely on the ground of danger to the community. The state has never claimed that the appeal was frivolous or the issues insubstantial. The state has never offered testimony or exhibits to make any showing of danger.

REASONS FOR GRANTING THE WRIT.

IMPORTANT CONSTITUTIONAL QUESTIONS NOT PREVIOUSLY DECIDED BY THE FULL COURT.

Where a state provides for bail on appeal can such bail be denied on less than federal standards required under the Eighth Amendment, and under the Due Process and Equal Protection clauses of the Fourteenth Amendment?

In *Rehman* v. *California,* 13 L. Ed. 2d 17, 85 S. Ct. 8 (1964, Black, J.) this Court, in a state court appeal, decided that (p. 18n.):

> ". . . bail pending appeal should be denied only in cases in which, from substantial evidence, it seems clear that the right to bail on appeal may be abused or the community may be threatened by the applicant's release. *Leigh* v. *United States,* 8 L. Ed. 2d 269, 271, 82 S. Ct. 994, 996."

The Court made it clear that bail on appeal was to be granted unless on such "substantial evidence" (p. 18) "the applicant fell within the small and exceptional category of people who are not entitled to bail on appeal."(*)

In *Sellers* v. *United States,* 89 S. Ct. 36 (1968, Black, J.) the Court decided, on the same standards—substan-

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(*) Only where an appeal is frivolous does this rule not apply, *Rehman* (p. 18n.). In the present case petitioner raises substantial questions on the merits of his appeal (copies of the briefs and abstracts will be filed as exhibits to this petition). The state has never taken the position that this appeal is frivolous or that petitioner's issues are frivolous, and the exception does not apply here. See *Aronson* v. *May,* 13 L. Ed. 2d 6, 8, 85 S. Ct. 3 (1964, Douglas, J.) deciding that if substantial issues are raised, that is grounds for bail on appeal.

tial evidence of flight or danger to the community—that bail on appeal was to be determined under the Eighth Amendment. And the Eighth Amendment applies to the states, *Pilkinton* v. *Cir. Ct. of Howell County, Mo.*, 324 F. 2d 45, 46 (1963), *Robinson* v. *California,* 370 U.S. 660 (1962).

Bail, under federal standards is not a matter of grace, *Cohen* v. *United States,* 7 L. Ed. 2d 518, 520, 82 S. Ct. 526 (1962),(*) and denial of bail by arbitrariness or as a result of discrimination is a violation of due process or equal protection of the laws, *Mastrian* v. *Hedman,* 326 F. 2d 708 (8th Cir. 1964), cert. den. 84 S. Ct. 1128 (at p. 711):

> "[amounting] in its effect to legal arbitrariness in the administration of the bail right provided so as to constitute a violation of due process, or to discriminatoriness in the application of the right as against petitioner, so as to constitute a violation of equal protection."

Illinois provides for bail on appeal but fails to comply with minimal federal standards and violates due process of law.

Illinois provides for bail on appeal, Ill. Rev. Stat., 1967, Ch. 38, Sec. 107(d):

> "After conviction, the court may order that the original bail stand as bail pending appeal, or deny, increase or reduce bail."

(*) "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor."

The petitioner in the *Cohen* case was granted bail pending determination of a certiorari petition.

And Illinois Supreme Court Rule 609(d), Ill. Rev. Stat., 1967, Ch. 110A, Sec. 609(d), provides that the reviewing court may set bond on appeal. Illinois, however, treats bail on appeal as a matter of grace, and does not comply with these standards.

The federal standards, as determined in *Rehman, supra,* require "substantial evidence" of flight or danger to the community, citing *Leigh, supra,* (Warren, J.). Evidence is the burden of the prosecution, *Ward* v. *United States,* 1 L. Ed. 2d 25, 76 S. Ct. 1063 (1956, Frankfurter, J.) where the trial record alone is insufficient to meet that burden, *Pannell* v. *United States,* 320 F. 2d 698, 700 (1963). Mere representations by the prosecution are not enough. Yet in the present case the record shows that the state did not make any record to support denial of bail on appeal.(*) Petitioner had been released on bail for some 60 days between the verdict and sentence. No request for revocation of bail was necessary by the state during that period. Yet the only opposition to bail on appeal is an unsupported claim of danger.(**)

(*) See *Carroll* v. *President and Commissioners of Princess Anne,* 21 L. Ed. 2d 325, 332, n. 10 (1968):

> ". . . there is danger in relying exclusively on the version of events and dangers presented by prosecuting officials because of their special interest."

Petitioner had three minor misdemeanor convictions and no felony convictions. Compare with what the Court said in *Cohen, supra.*

(**) Contrast with what the Court said in *Princess Anne, supra.*

Illinois discriminates in granting bail on appeal, in violation of the equal protection clause.

The equal protection clause of the Fourteenth Amendment applies to questions of bail, *Mastrian, supra.* Yet Illinois provides for and grants bail on appeal, but does so in a discriminatory and arbitrary manner, in violation of the Fourteenth Amendment.

Cases where bail has been denied or granted in Illinois show a capricious, non-pattern result. The Illinois Supreme Court has granted bail on appeal to persons convicted of murder (*People* v. *Nuccio,* No. 41975, 1968) (a shooting in the back); (*People* v. *Branion,* No. 41622, 1968) (eleven shots fired into wife); kidnapping (*People* v. *Bravos* No. 42616, 1969) (four crime syndicate members convicted in 1967 in a "juice loan" case—involving kidnapping, torture and murder threats). In the same court, Circuit Court of Cook County, Criminal Division, where petitioner was denied bail on appeal, bail on appeal was granted on convictions of manslaughter (*People* v. *Hough, Larson* v. *Mazzone & Kracht,* No. 68-1855, 1968) (defendants beat a youth to death with a baseball bat); conspiracy to commit murder (*People* v. *Saiken,* No. 68-840, 1969) (acquittal of murder).

Yet petitioner was acquitted of murder, where at best he was tried on an accountability theory, and then released on bail until sentencing, and then sentenced to less than the maximum; but denied bail on appeal.

It is apparent that Illinois deals with bail on appeal as a matter of grace, and in petitioner's case did so in violation of his constitutional rights.

CONCLUSION.

The Court should grant review to consider and apply Eighth Amendment bail rights and Fourteenth Amendment Due Process and Equal Protection rights to bail in state court appeals.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 12, 1969

Before
Hon. Latham Castle, Chief Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge

United States of America, ex rel Eugene Hairston,
Petitioner

No. 17585 vs.

Frank J. Pate, Warden, Illinois State Penitentiary; and Ross V. Randolph, Director of Public Safety.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

This matter comes before the court on motion of Eugene Hairston, petitioner-appellant, for a certificate of probable cause and his motion for extension of time for filing his brief.

Eugene Hairston is in custody, pursuant to the judgment of an Illinois court, having been convicted of solicitation of murder. He has taken an appeal to the Supreme Court of Illinois and his appeal is pending. The state trial and supreme courts have denied bail pending appeal.

He petitioned the district court for a writ of habeas corpus and release on bond while his appeal is pending. He alleged the denial of bail was summary, arbitrary, and discriminatory.

The district court denied the petition and denied a certificate of probable cause for the reasons stated in a memorandum opinion. He concluded that there had been no abuse of discretion by the state court judge.

The existence of any federal protection of a right to bail after a state court conviction and while a state court appeal is pending is doubtful. Intentional, purposeful, invidious discrimination would have to be clearly shown.

In the instant case, the state judge was familiar with the circumstances of the crime as shown in the evidence. The state's evidence apparently showed that Hairston had urged three young teenagers to violent assault, resulting in death of one man and wounding of others. Hairston's sentence was not less than five nor more than fifteen years. His record included convictions of aggravated assault (1961), of battery (1965), of resisting arrest and disorderly conduct (March 1967) and resisting arrest (May, 1967). Having presided at the trial, the judge heard an evaluation of the possibility of reversal on appeal, although the state has not argued that the appeal is frivolous.

Although it is true that Hairston appeared at all times prior to sentence, when free on $15,000 bond, it can not be said that the state court judge abused his discretion nor demonstrated intentional, purposeful, invidious discrimination.

Each of the judges above named refuses to issue a certificate of probable cause.

Accordingly,

It Is Ordered, that the appeal is dismissed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, July 22, 1969

Before
Hon. Latham Castle, Chief Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

United States of America
ex rel. Eugene Hairston,
Petitioner-Appellant,

No. 17585 vs.

Frank J. Pate, Warden, Illinois State Penitentiary; and Ross V. Randolph, Director of Public Safety,
Respondents-Appellees.

ORDER

This cause came on to be heard upon the Motion for Rehearing En Banc filed May 12, 1969; and no active judge of this court or judge in regular service having requested a vote on the suggestion of rehearing en banc within ten days of the distribution of the petition and the suggestion, as required by this court's internal rule implementing Rule 35(b) of the New Federal Rules of Appellate Procedure;

It Is Ordered that the Motion for Rehearing En Banc be and it is hereby denied.

It Is Further Ordered that the Request for Oral Argument and Leave to File an Additional Brief filed July 18, 1969, be and it is hereby denied.

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Supreme Court of the United States

October Term, 1969

No. 338

UNITED STATES OF AMERICA, ex rel.
EUGENE HAIRSTON,

Petitioner,

vs.

FRANK J. PATE, Warden, Illinois State Penitentiary; and, HERBERT D. BROWN, Director of Public Safety,

Respondents.

(On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit)

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

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Petitioner,

VS.

FRANK J. PATE, Warden, Illinois State Penitentiary; and, HERBERT D. BROWN, Director of Public Safety,

Respondents.

(On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit)

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Eighth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Petitioner has an Eighth Amendment right to bail pending appeal of state conviction.

2. Whether denial of bail to Petitioner pending appeal in the state courts violated the Due Process or Equal Protection Clauses.

STATEMENT OF THE CASE

On September 12, 1967, Eugene Hairston was indicted (No. 67-3284) in Cook County, Illinois, on three (3) counts for solicitation to murder, two (2) counts of murder and two (2) counts for attempted murder. (R. 002-016) Pretrial bail was denied. (R. 077) In May 1968, petitioner was tried in the Circuit Court of Cook County (Criminal Division) before Judge Louis A. Wexler. Hairston was convicted by a jury of soliciting a thirteen (13) year old boy to shoot and kill certain young men that had alienated Hairston. (R. 812, 959, 1149) At the time of the shootings, Petitioner was the leader of a Chicago street gang known as the Black Stone Rangers. (R. 842, 987) The young boy solicited by Hairston shot three young men as they sat in a automobile, wounding two (2) and killing one (1). (R. 706, 959, 1149) After the conviction but before sentencing, Petitioner was granted bail in the amount of $15,000. (R. 2023) During the hearing in aggravation and mitigation prior to sentencing, Judge Wexler was informed that (1) in 1961, Petitioner was sentenced to six (6) months in the Illinois House of Correction for aggravated battery, (2) in 1965, he was granted probation but subsequently violated the same, receiving sixty (60) days in Vandalia (Illinois); and (3) in March and again in May, 1967, Petitioner was twice convicted for resisting arrest. (R. 2129-30) Two witnesses testified for the defense in mitigation but gave no indication that the Petitioner had changed his previously apparent habitual violent and anti-social behavior. (R. 2151-69) Judge Wexler sentenced Hairston to the Illinois

Penitentiary for not less than five (5) nor more than fifteen (15) years. In the exercise of his discretion, the court denied the Petitioner bail pending appeal. (R. 2177, 2179)

Petitioner directly appealed his conviction to the Supreme Court of Illinois. The appeal is presently pending. On three separate occasions, he has unsuccessfully petitioned for bond on appeal from the Supreme Court; before a single justice on September 3 and October 1 of 1968, and, before the full Supreme Court on October 3, 1968. Denials were without opinion. In the Supreme Court of the United States twice, Petitioner's motion for bail has been denied (on November 18, 1968 by Mr. Justice Marshall; and, by the Court on December 9, 1968).

On April 25, 1969, a petition for Writ of Habeas Corpus was denied by Judge Marovitz sitting in the United States District Court for the Northern District of Illinois, Eastern Division (Memorandum Opinion No. 69 C 711). A Motion for Emergency Relief was denied by the United States Court of Appeals for the Seventh Circuit on May 5, 1969, rehearing denied on July 22, 1969, and a certificate of probable cause was denied on August 12, 1969.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NO ABSOLUTE RIGHT TO BAIL PENDING APPEAL UNDER THE EIGHTH AMENDMENT.

Theoretically, the commandment of the Eighth Amendment that "[e]xcessive bail shall not be required" reasonably evokes a dichotomous interpretation: either, (1) creating an absolute constitutional right to bail; or, (2) prohibiting excessive bail when granted within the discretion of the court or as directed by statute. The latter interpretation is clearly more logical and efficacious when the two hypotheses are analyzed from the genesis and purpose of the American bail system.

Our contemporary bail concept had its beginning in medieval England. Bail, as a formal legal tool, evolved from necessity to implement the 39th Chapter of the Magna Carta which promised that no free man should be arrested or detained in prison unless by the law of the land.[1] Apparently, the first definitive institutionalization of the right to bail occurred in 1275 in the Statute of Westminster I.[2] The aforementioned statute, establishing the right to bail, was subsequently implemented by the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689.[3] In the American colonies, the first sig-

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1. Foote, "The Coming Constitutional Crisis in Bail, Part I," 113 U. of Penn. L.R. 959, 965-66 (1965).

2. 1275, 3 Edw. 1, C. 15.

3. (a) Petition of Right of 1628, 3 Charles 1, C. 1, was the result of Darnel's case, 3 How. St. Tr. 1 (1627), and

nificant provisions for bail were also statutory.[4] During the colonial era, in England and the colonies, there were numerous offenses made non-bailable by statute in addition to crimes punishable by death. It is interesting to note that the Virginia Declaration of Rights of 1776, one of the first colonial constitutions, failed to establish an absolute right to bail and merely restated the English Bill of Rights prohibiting excessive bail, excessive fines, or cruel and unusual punishment. And Madison, in proposing the Eighth Amendment to the United States Constitution, apparently reechoed this same language from the 1776 Declaration of Rights. The Northwest Ordinance of 1787 established that "all persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." This ordinance became the antecedent of most of the state constitutional and statutory bail provisions. The above language also formed the conceptual nucleus for the Judiciary Act of 1789 and the present Rule 46 of the Federal Rules of Criminal Procedure, 18 USCA §§3146, 3148.[5]

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made the provisions of the Magna Carta applicable to pretrial imprisonment.

(b) Habeas Corpus Act of 1679, 31 Charles 2, C. 2, provided a remedy for those persons accused of bailable offenses who had no bail.

(c) Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, C. II, §1(10) reacted to the practice of the English judiciary in setting impractically high pretrial bails by requiring that excessive bails should not be set.

4. E.g., Massachusetts Body of Liberties of 1641—Provided that all crimes were bailable except for capital offenses, the latter being bailable at the judge's discretion.

5. (a) Judiciary Act of 1789,
Act of September 24, 1789, §33, 1 Stat. 73, 91.

Traditionally, the purposes of bail were threefold: (1) to insure the appearance of the accused for trial, (2) to prevent infliction of punishment prior to conviction, and (3) to permit the unhampered preparation of a trial defense. *Stack* v. *Boyle,* 342 U.S. 1 (1951); *Ex parte Milburn,* 34 U.S. 704, 710 (1835). Generally then, bail was a pretrial adjunct to assist the accused in preserving his presumption of innocence. Consequently, in view of the above-mentioned purposes for bail, it was neither ideologically necessary nor functionally efficiacious for the legal institutional evolution to provide an absolute right to bail in all circum-

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(b) Rule 46. Release on bail.

"(a) Right to Bail:

(1) Before conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by a court or judge with authority by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

(2) Upon Review. Bail may be allowed pending appeal or certiorari, unless it appears that the appeal is frivolous or taken for delay.

(c) Terms. The amount thereof shall be such as in the judgment of the court will insure the presence of defendant, having regard to the nature and circumstances of the offense charged, weight of evidence against him, financial ability of defendant to give bail and the character of the defendant."

stances; and, there was not.[6] Notwithstanding the reasons for the proposition that there is no constitutional right to bail prior to trial, upon conviction, the accused's presumption of innocence is lost and most reasons supporting the argument that there is an absolute right to pretrial bail are negated. The accused becomes a defendant seeking reversal of his conviction with a relatively stronger motivation to flee the jurisdiction of the court. The majority of jurisdictions clearly reflect that there is no absolute right to bail pending appeal and the matter is solely within the reasonable discretion of the trial court.[7] The previous rule is sound for an additional reason, i.e., since there is no constitutional right to appeal per se, it follows that there should be no constitutional right to bond pending appeal. See *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

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6. See Carlson v. Landon, 342 U.S. 524 (1952); Mastrian v. Hedman, 326 F. 2d 708, 710 (8th Cir. 1964), *cert. denied,* 375 U.S. 942 (1964).

7. E.g., (a) FEDERAL

(1) 18 USCA §§3146, 3148
(2) Bowman v. United States, 85 S. Ct. 232 (1964)
(3) United States ex rel. Fink v. Heyd, 408 F. 2d 7 (5th Cir. 1969)

(b) STATE

(1) ARIZONA:
In re Welisch, 18 Ariz. 517, 163 Pac. 264 (1917)
Const. Art. 2, § 22
Pen. Code 1913, § 1190

(2) ARKANSAS:
Lane v. State, 217 Ark. 428, 230 S.W. 2d 480 (1950)
Const. Art. 2, §§8, 9
Ark. Stat. §43-2714

In summary, the Respondents respectfully submit that since the Eighth Amendment does not require an absolute right to bail either prior to trial or pending appeal, the denial of petitioner's bail pending appeal by the Illinois Courts does not begin to raise a constitutional question of Eighth Amendment magnitude.

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(3) CALIFORNIA:
In re Scaggs, 47 Cal. 2d 416, 303 P. 2d 1009 (1964)
West's Ann. Pen. Code, §§1270-1272

(4) COLORADO:
Smaldone v. People, 153 Col. 208, 385 P. 2d 127 (1963) *cert. denied* 382 U.S. 1012 (1963)

(5) FLORIDA:
Younghans v. State, 90 So. 2d 308 (Fla. 1956)
F.S.A. Const. Declaration of Rights, §9
F.S.A. §903.01

(6) GEORGIA:
Ingram v. Grimes, 213 Ga. 652, 100 S.E. 2d 914 (1957)
Laws 1916, p. 157; Code, §6-1005

(7) IDAHO:
State v. Dunn, 91 Idaho 870, 434 P. 2d 88 (1967)
I.C. §§19-2806, 19-2905.

(8) ILLINOIS:
People v. Davis, 1 Ill. C.C. 528 (1901)
Bennett v. People, 94 Ill. 581 (1880)
People v. Vaseska, 74 Ill. App. 2d 297 (1966)

(9) INDIANA:
State ex rel. VonHauger v. Criminal Court of Marion County, 247 N.E. 2d 87 (1969)
Supreme Court Rules, rules 2-3

(10) KENTUCKY:
Braden v. Lady, 276 S.W. 2d 664 (Ky. 1955)
Const. §§16 , 17
Cr. Code Prac. §75

II.

PETITIONER'S DENIAL OF BAIL PENDING APPEAL WAS NOT VIOLATIVE OF DUE PROCESS OR EQUAL PROTECTION.

"One law for the lion and ox is oppression."
William Blake . . . .

In the present context, the allegations of Due Process and Equal Protection violations and the resultant answers are of such similar character as to merit a unitary re-

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(11) MARYLAND:
Fischer v. Ball, 212 Md. 517, 129 A. 2d 822 (1957)
Const. Declar. of Rights , Art. 5
Code 1951, Art. 5, Sec. 86

(12) MICHIGAN:
People v. Giacalone, 16 Mich. App. 352, 167 N.W. 2d 871 (1969)
M.C.L.A. Const. 1963, Art. 1, §§15, 16
M.C.L.A. §§765.5, 765.6

(13) MINNESOTA:
State v. Freitag, 281 Minn. 573, 161 N.W. 2d 530 (1968)
M.S.A. §§633.20, 633.21

(14) MISSISSIPPI:
Ex parte Willette, 219 Miss. 785, 63 So. 2d 52 (1953)
Const. 1890, §29
Code 1942, §1180

(15) MISSOURI:
Ex parte Carey, 306 Mo. 287, 267 S.W. 806 (1924)
Rev. Stat. 1919, §4092

(16) MONTANA:
Bubnash v. State, 139 Mt. 639, 366 P. 2d 867 (1961)
R.C.M. 1947, §94-8305

sponse. The present issue is simply: was denial of petitioner's bail pending appeal by the Illinois Courts so arbitrary and capricious to be fundamentally unfair?

In Illinois, in nearly all cases the accused has a statutory right to bail while his trial is pending. Ill. Rev. Stat. 1967, Ch. 38, §110-4(a). When there has been a conviction, how-

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(17) NEW HAMPSHIRE:
State v. Hutton, 107 N.H. 426, 223 A. 2d 416 (1966)

(18) NEW JERSEY:
State v. Biehl, 136 N.J.L. 82, 54 A. 2d 231 (1947)
N.J.S.A. 2: 195A-6

(19) NEW MEXICO:
Tijerina v. Baker, 78 N.M. 770, 438 P. 2d 514 (1968)
Const. Art. 2, §13

(20) NEW YORK:
People ex rel. Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E. 2d 498 (1943)
Const. Art. 1, §5
Code Cr. Proc. §§552, 553

(21) NEVADA:
State v. Teeter, 53 C.A. 545, 200 P. 2d 657 (Nev. 1948)
Const. Art. 1, § 7

(22) NORTH CAROLINA
In re Ferguson, 235 N.C. 121, 68 S.E. 2d 792 (1952)
G.S. §15-183

(23) OHIO:
Coleman v. McGettrick, 2 Ohio St. 2d 177, 207 N.E. 2d 552 (1965) *cert. denied,* 382 U.S. 834 (1965)
Const. Art. I, §9
R.C. §§2949.02, 2953.09

(24) OREGON:
Hanson v. Gladden, 246 Or. 494, 426 P. 2d 465 (1967)
Const. Art. 1, §14
O.R.S. 140:020, 140:030

ever, the courts need not admit the defendant to bail. Ill. Rev. Stat. 1967, Ch. 38, §110-7(d); Ill. Rev. Stat. 1967, Ch. 110A, §609(b). *People v. Davis,* 1 Ill. C.C. 528 (1901); *Bennett* v. *People,* 94 Ill. 581 (1880). The Illinois constitutional "right" to bail refers only to the use of sureties to insure the presence of the accused at his trial as an alternative to

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(25) PENNSYLVANIA:
Commonwealth v. Keller, 433 Pa. 20, 248 A. 2d 855 (1969)
P.S. Const. Art. 1, §14
Pa. Rules Crim. Proc., rule 4004(b), 19 P.S. Appendix

(26) RHODE ISLAND:
Quattrocchi v. Langlois, 100 R.I. 741, 219 A. 2d 570 (1966)
Const. Art. 1, §9
Gen. Laws 1956, §12-19-1

(27) SOUTH CAROLINA:
Nichols v. Patterson, 202 S.C. 352, 25 S.E. 2d 155 (1943)
Const. Art. 1, §20
Code 1942, §§1031, 1032

(28) SOUTH DAKOTA:
City of Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999 (1925)
Const. Art. 6, §8
Rev. Code 1919, §5039

(29) TENNESSEE:
Goins v. State, 192 Tenn. 32, 237 S.W. 2d 8 (1950)

(30) TEXAS:
Ex parte Ezell, 40 Tex. 451 (1874)

(31) WASHINGTON:
Ex parte Berry, 198 Wash. 317, 88 P. 2d 427 (1939)
Const. Art. 1, §20
Rem. Rev. Stat. §§1747, 2310, 2410-1

being jailed.[8] Thus, petitioner's conviction eradicted any claim of an absolute constitutional or statutory right to bail on appeal; and, the state courts had authority to deny bail on appeal within their discretion. The question becomes: was there an unreasonable abuse of discretion sufficient to violate the federal constitution?

The salient facts apparent to the state courts during the exercise of their discretion in denying petitioner bail pending appeal are these. On September 12, 1967, Eugene Hairston was indicted (No. 67-3284) in Cook County, Illinois, on three (3) counts for solicitation to murder, two (2) counts of murder, and two (2) counts for attempted murder. (R. 002-016). Petitioner was tried and convicted by a jury of three (3) counts of solicitation to murder, i.e., soliciting a thirteen (13) year old boy to shoot and kill certain young men that had been "messing with the chief." (R. 812, 959, 1149) At the time of the murder, petitioner was Chief of the Black Stone Rangers. (R. 842, 987). The Black Stone Rangers are a Chicago street gang. The Illinois courts have frequently confronted and acknowledged the often vio-

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(32) WEST VIRGINIA:
State ex rel. Burford v. McKee, 135 W.Va. 18, 62 S.E. 2d 281 (1950)
Code, 62-1-6

(33) WYOMING:
State v. Helton, 72 Wyo. 105, 261 P. 2d 46 (1953)
Const. Art. 1, §14
W.C.S. 1945, §§3-5414, 10-1411

8. Constitution of Illinois 1870, Art. II, §7: "all persons shall be bailable by sufficient sureties, except for capital offense, where the proof is evident or the presumption great; . . ."

lent and anti-social behavior of such "street" associations.[9] The young boy solicited by Hairston shot three (3) young men, wounding two (2) and killing one (1). (R. 706, 959, 1149). After conviction and during the hearing in aggravation and mitigation prior to sentencing, the court was informed that (1) in 1961, petitioner was sentenced to six (6) months in the Illinois House of Correction for aggravated battery, (2) in 1965, he was granted probation and subsequently violated that probation, receiving sixty (60) days in Vandalia (Illinois), and (3) in March and again in May, 1967, petitioner was twice convicted for resisting arrest. (R. 2130). The two witnesses testifying for the defense in mitigation gave no indication that the petitioner had changed his previously apparent habitual violent and anti-social behavior. (R. 2151-69).

Although the federal standard for admission to bail is not binding upon the states per se, test of the present issue

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9. (a) People v. Richardson, 32 Ill. 2d 479, 207 N.E. 2d 449 (1965)

Vice Lords and Cobras

(b) People v. Hill, 39 Ill. 2d 125, 233 N.E. 2d 367 (1968)

Casanova Cobras and Roman Saints

(c) People v. Wrenn, 29 Ill. 2d 581, 195 N.E. 2d 154 (1964)

People v. Hughes, 26 Ill. 2d 114, 185 N.E. 2d 834 (1962)

Vice Lords

(d) People v. Lewis, 32 Ill. 2d 391, 207 N.E. 2d 65, (1965)

Egyptian Cobras and Vice Lords

against this standard provides a juxaposition for a reasonable analysis and reveals not only that the denial of petitioner's bail pending appeal was proper but demanded of the state courts.

Section 3148 of Title 18 of the United States Code requires that "a person . . . who has been convicted of an offense [shall be released pending appeal] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." In *Sellers* v. *United States*, 89 S. Ct. 36, 38 (1968), Justice Black, sitting as a Circuit Justice, declared that if 'dangerousness' is "ever a justifiable ground for denying bail as distinguished from a separate proceeding for a bond to keep the peace—[it must] relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail." In complement, however, Justice Douglas declared in *Carbo* v. *United States*, 82 S. Ct. 662, 666 (1962) and *Rehman* v. *State of California*, 85 S. Ct. 8, 9 (1964) that if the "safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail."

The trial testimony, the jury's conviction on three (3) counts for solicitation to murder, the prosecution's revelations during the hearing in aggravation and mitigation, and petitioner's past criminal record, all attested to the habitual violent behavioral patterns of the defendant. Although the trial court did not explicitly explain the reasons for denial of petitioner's bail pending appeal, he need not—for the record before him declared clearly, succinctly, and substantially why bail should be denied. See *United States* v. *Blyther*, 295 F. Supp. 1088, 1090 (D.D.C. 1969).

The test for determining whether a particular state action has violated Fourteenth Amendment Due Process or whether a right extended by the United States Constitution relative to federal criminal proceedings is also applicable to the states via Fourteenth Amendment Due Process has been phrased by the Supreme Court of the United States in various ways. The question is whether a particular right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell* v. *Alabama,* 287 U.S. 45, 67 (1932) [quoting from *Hebert* v. *Louisiana,* 272 U.S. 312, 316 (1926)]; or, whether it is "basic in our system of jurisprudence," *In re Oliver,* 333 U.S. 257, 273 (1948); or, whether it is a "fundamental right, essential to a fair trial," *Gideon* v. *Wainwright,* 372 U.S. 335, 343-44 (1963); *Malloy* v. *Hogan,* 378 U.S. 1, 6 (1964); *Pointer* v. *Texas,* 380 U.S. 400, 403 (1965); or, whether it "shocks the conscience," *Rochin* v. *California,* 342 U.S. 165, 172 (1952); or, whether it is "fundamental to the American scheme of justice" or, "represents a fundamental ideal in our constitutional heritage." *Duncan* v. *Louisiana,* 391 U.S. 145, 149 (1968); *Benton* v. *Maryland,* 395 U.S. 784, 794 (1968), correspondingly. And, as stated in *Betts* v. *Brady,* 316 U.S. 455, 462 (1942): "[An] asserted denial [of Due Process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denials."

Within the purview of the above-mentioned Due Process rationale, the state respectfully observes that the facts of the present case negate any allegation that there was an

arbitrary abuse of discretion and consequent Due Process violation by the state. Determination of bail is and should be a highly individualized process, necessitating the giving of significant deference to the trial judge's determination.[10] Such is the case presented.

CONCLUSION

For the reasons stated herein, Respondents request that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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10. See Sellers v. United States, *supra* and People of the State of New York v. Hutchinson, 360 F. 2d 759 (2nd Cir. 1966).

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OCTOBER TERM, 1969

No. 833

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Petitioner,

vs.

FRANK J. PATE, Warden, Illinois State Penitentiary; and HERBERT D. BROWN, Director of Public Safety,

Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case raises issues of broad significance in state and federal criminal appeals: Is there an Eighth Amendment right to bail on appeal? Is the statutory availability of bail on appeal subject to fair rules and standards of due process of law, and the even handed application required by equal protection of the laws?

The State (St. Ans. pp. 4-8) questions whether there is a right to bail under the Eighth Amendment—and concludes (at p. 6) "it was neither ideologically necessary nor functionally efficacious" for such a right—without citation of authority. But what about *Herzog* v. *United States,* 75 S. Ct. 349, 351 (1955)? Douglas, J., sitting as a Circuit Justice, decided in a case on bail on appeal:

> "Bail is basic to our system of law. See the Eighth Amendment; *Stack* v. *Boyle,* 342 U.S. 1 (1951)."

And what of the decisions of a federal appeals court in *Pilkinton* v. *Cir. Ct. of Powell County, Mo.,* 324 F. 2d 45, 46 (8th Cir. 1963), and of this Court in *Robinson* v. *California,* 370 U.S. 660 (1962) (Pet. p. 10)?

The State of Illinois does not quarrel with the proposition that Illinois applies the standards of federal law (Pet. pp. 10 and 11) when dealing with the issue of bail on appeal. But

> ". . . federal law reflects the purpose that 'no one shall be required to suffer imprisonment for crime before the determination of his case in the court of last resort.'" (Mr. Justice Butler, sitting as a Circuit Justice, *United States* v. *Motlow,* 10 F. 2d 657, 662 (7th Cir. 1926), 82 S. Ct. 526, 528, 7 L. Ed. 2d 516, 520 (1962, Douglas, J., as Circuit Justice)

Yet where does Illinois practice meet the purpose of federal law? Nowhere does the State doubt that the appeal raises serious issues, or say that the appeal is frivolous. Note Warren, C.J., as Circuit Justice, on the need to allow bail where an appeal is not frivolous:

> ". . . unless he is now admitted [to bail] he might of necessity serve more than the minimum term of his sentence before there is an adjudication in the Court of Appeals. In those circumstances, his appeal

would be of little benefit to him even if he should prevail." *Ellis* v. *United States,* 79 S. Ct. 428, 3 L. Ed. 2d 565 (1959).(*)

And, if we are dealing with fair standards of due process and equal protection of the laws, where according to the State of Illinois are these standards? The State says (St. Br., p. 7):

> "Notwithstanding the reasons for the proposition that there is no constitutional right to bail prior to trial, upon conviction, the accused's presumption of innocence is lost and most reasons supporting the argument that there is an absolute right to pretrial bail are negated. The accused becomes a defendant seeking reversal of his conviction with a relatively stronger motivation to flee the jurisdiction of the court. The majority of jurisdictions clearly reflect that there is no absolute right to bail pending appeal and the matter is solely within the reasonable discretion of the trial court. The previous rule is sound for an additional reason, *i.e.,* since there is no constitutional right to appeal per se, it follows that there should be no constitutional right to bond pending appeal. See *Griffin* v. *Illinois,* 351 U.S. 12 (1956)."

Griffin stands for no such nonsense.

(*) At the time of preparation of this reply, the State of Illinois is in default on filing its answer on the merits of petitioner's appeal (due, on its request for a continuance, on February 5, 1970, in the Illinois Supreme Court). He has been jailed since August 14, 1968, when his appeal bond was denied. He previously served 7 months pending trial without bond. Under Illinois law on his sentence of 5 to 15 years with credit for good time served, petitioner's minimum sentence could be 3 years 9 months (although he would be subject to parole control until the expiration of the full fifteen years).

The State, seeking to answer questions on equal protection and due process, quotes William Blake (St. Ans. p. 9):

"*One law for the lion and the ox is oppression.*"

Does this mean that there is to be one law for petitioner, who had no felony record,(*) who was allowed bail after the verdict,(**)—bail never sought to be revoked by the State pending sentence—, and a different law for those allowed bail by Illinois,—a list of cases where bail was allowed in Illinois is set out (Pet. Br., p. 12). The State does not show any standard on which bail was allowed in those cases and denied to petitioner.(***)

(*) The State set out petitioner's full prior record (S. Br., p. 13): misdemeanor or ordinance violations, without serious punishment, overcharacterized, with this limitation by the State as "apparent habitual violent and anti-social behavior."

(**) As set out below, the State (S. Br., p. 14) seeks to lead this Court to understand that the trial court was not aware of all of the facts when it allowed bail pending sentence. The record—set out in full (Pet. Br., pp. 5-6) shows no new facts.

(***) In *People* v. *Messino, et al.* No. 42616 (1969) Illinois allowed bail, first pending appeal, then pending application to this Court for a writ of certiorari. The writ was denied on February 24, 1970, No. ....., Oct. Term, 1969, and the petitioners surrendered to serve their sentences. The State's Attorney of Cook County does not agree with this Court that generally no sentence should be served until "determination . . . in the court of last resort" (*Motlow, supra*). Instead, commenting on the *Messino* case, he demeaned the allowance of bail pending appeal:

> "They should have been in prison for the last three years, but court technicalities have permitted their freedom on bond." (Chicago Sun Times, February 25, 1970.)

The State's Attorney did not consider this question: what if a conviction is reversed? What about time spent in prison on a wrongful conviction?

On careful analysis, the design of the State's brief is to show that petitioner is a member of an unpopular—though not illegal—group (St. Br., pp. 12-13)—as the sole ground put forth to deny bail on appeal. The State purposefully overlooks the record: the trial court was well aware of petitioner's membership during the entire trial [Trial Abst. pp. 39, 40, 42, 70, 72, 73] and then allowed petitioner released on bail pending sentence.(*) The State tries to make it appear that membership was a factor in denial later of bail on appeal. But the argument that membership would be a ground for denial of bail runs counter to another firmly established principle: if an issue on appeal is not frivolous, that issue cannot form the basis to deny bail on appeal, "the question of the guilt or innocence of an appellant is not an issue on application for bail." *D'Aquino* v. *United States,* 180 F. 2d 271, 272 (9th Cir. 1950) (Douglas, J., Circuit Justice).(**) Denial of bail based on the nature of the conviction alone would nullify the statutory scheme for bail on appeal. *White* v. *United States,* 412 F. 2d 145, 147 (D.C. Cir. 1968)

(*) The trial court did not impose the maximum sentence on the charge in this case.

(**) See footnote, Pet. p. 10 setting out that:

"Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders."

CONCLUSION.

The appeal on the merits is not frivolous. The State has not sustained the burden of showing that petitioner might flee or be a risk to the community. In *Herzog* v. *United States,* 75 S. Ct. 349, 351 (1955), *supra,* Justice Douglas, as a Circuit Justice, in a case preceding the liberalization of the Federal Rules on bail on appeal, stated:

> "Doubts whether [bail on appeal] should be granted or denied should always be resolved in favor of the defendant." citing *Motlow,* supra.

This court should grant review, allow petitioner on bail, and establish fair and uniform standards for bail on appeal in criminal cases.

Respectfully submitted,

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